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# Supreme Court of the United States

October Term, 1975

No. 74-1647

THE E. W. SCRIPPS COMPANY
and JOHN DOE, Reporter,
*Petitioners,*

vs.

THOMAS H. MALONEY
& SONS, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

RUSSELL E. LEASURE
1956 Union Commerce Building
Cleveland, Ohio 44115
*Attorney for Petitioners*

BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
*Of Counsel*

THE GILVIN LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-3247

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## PETITION FOR A WRIT OF CERTIORARI
**To the Supreme Court of Ohio**

The petitioners, The E. W. Scripps Company and John Doe, Reporter, respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Ohio dismissing petitioners' appeal of right on constitutional grounds.

## OPINIONS AND ORDERS BELOW

The orders of the Ohio Supreme Court dismissing petitioners' appeal of right on constitutional grounds, and overruling petitioners' motion for an order to certify the

record of the Court of Appeals, are attached hereto as Appendix A and Appendix B respectively.

The order and opinion of the Court of Appeals (one judge dissenting) reversing the trial court's entry of summary judgment for petitioners in this libel action, and remanding the cause for trial on a liability issue of simple negligence, is attached hereto as Appendix C.

The order of the trial court entering summary judgment for petitioners is attached as Appendix D. The trial court did not render an opinion.

## JURISDICTION

The orders of the Supreme Court of Ohio dismissing petitioners' appeal as a matter of right on constitutional grounds, and overruling petitioners' motion to certify the record, were entered on April 11, 1975 (Appendix A and B). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

1. Was the Supreme Court of Ohio in error because of its failure (a) to impose an "actual malice" standard of proof under the First Amendment upon a plaintiff (1) who brought suit with respect to a routine news item reporting a judicial decision and (2) who had been drawn as a principal into the particular public controversy (i.e., the lawsuit) giving rise to the alleged defamation, and (b) under that standard to reverse the Court of Appeals

and affirm the trial court's entry of summary judgment for defendants?

2. Was the Supreme Court of Ohio in error because of its failure (a) to apply to the words "I guess we got carried away." the rule that to be actionable under the First Amendment words must be a defamatory statement of fact rather than the expression of idea or hyperbole, and (b) under that rule to reverse the Court of Appeals and affirm the trial court's entry of summary judgment for defendants?

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, §1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amend. I.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV.

## STATEMENT OF THE CASE

This is an action for alleged libel. Petitioner The E. W. Scripps Company is the publisher of, and petitioner John Doe, Reporter, is a reporter for, The Cleveland Press, a daily except Sunday newspaper published in Cleveland, Ohio. Respondent corporation brought this action based on a news item which appeared in the final afternoon edition of The Cleveland Press on Friday, March 13, 1970, reporting a court decision just rendered in a case wherein respondent was the defendant. The entire news item stated as follows (it is the last sentence *only*, i.e., "I guess we got carried away." that a majority of the Court of Appeals deemed actionable—holding it to be defamatory as a matter of law and actionable upon proof of simple negligence):

"Friday, The 13th Wasn't Their Day

"Wrong Building Wrecked—$15,000

"Common Pleas Judge August Pryatel ruled today that the Thomas H. Maloney & Sons Wrecking Co., 16891 Brookpark Rd., must pay United Garage and Service Corp. $15,948.72 for a building wreckers demolished last Mar. 25.

"They demolished the building, a repair station for taxicabs, by mistake.

"The station, at 17202 Lorain Ave., was next to a building the wreckers were hired to demolish. Having demolished the right building, Maloney & Sons then tore down the wrong one.

" 'Well, somebody, I don't remember who, said we should knock both buildings down,' Thomas Maloney told the Judge. 'I guess we got carried away.' "

The decision so reported was rendered by Judge Pryatel on the morning of publication, and at about noon on that day the Judge described orally his ruling and the reasons therefor to petitioner John Doe, Reporter (one Bus Bergen), the newspaper's regular beat reporter. Reporter Bergen then went to the Court Clerk's office where he obtained the original pleadings in the case and read them, and then, in order to make the deadline for the final afternoon edition, phoned in the news report from the court house. Bergen did not have the time or the means to prepare the article in final form, but gave the substance of the Judge's oral report and the pleadings to a young lady on the rewrite desk who took the information and prepared and submitted the final article within the type-setting and printing deadline for the final edition.

The last quotation in the article: "I guess we got carried away.", was ascribed erroneously to an official of respondent. However, the reported facts that respondent had wrecked the wrong building under the circumstances described, and had been held legally liable therefor, were absolutely true and correctly reported. The truth of those facts was proved without dispute by means of certified copies of court records submitted in support of petitioners' motion for summary judgment which was granted by the trial court.

As soon as Reporter Bergen read the article in the newspaper later that day he knew it was inaccurate in some minor respects. He thereupon resolved to go to work early the next morning and prepare a correction for the next day's paper. This was done and a correction was published in the next edition.[1]

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1. The correction expressly stated that Thomas Maloney had not uttered the words attributed to him.

Uncontroverted evidence of the foregoing facts relative to the preparation, publication, and correction of the news item is contained in Bergen's deposition filed herein in the trial court. Therefore, direct and uncontroverted evidence of the lack of actual malice appeared in support of petitioners' motion for summary judgment which was granted. Respondent took, but did not file, the depositions of the rewrite girl and the City Editor; they contained no evidence whatever of any "actual malice" as defined in *New York Times v. Sullivan*, 376 U.S. 254, at 279-280.

The Common Pleas Court of Cuyahoga County (trial court) granted summary judgment for petitioners on the basis of petitioners' motion supported by a copy of the news article, the Bergen deposition, and certified copies of the pleadings, admissions, and judgment entry appearing in the judicial proceeding giving rise to the publication. The trial court wrote no opinion.

The Ohio Court of Appeals for Cuyahoga County (one judge dissenting) reversed on the joint grounds: (1) that respondent corporation is a "private" individual for purposes of this publication and therefore entitled to recover for simple negligence; and (2) that the quotation "I guess we got carried away." is defamatory as a matter of law, on the theory that it necessarily "ascribes" to respondent's workers "a penchant for destruction which prevents them from stopping when the assigned demolition is completed" (Appendix C, p. 20).

Although copiously discussing and following *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, on the subject of "fault" liability, the majority provides no explanation or justification whatever for its categorization of respondent as a "private" person instead of a public figure for a limited purpose under *Gertz*. Nor did the majority refer to or

attempt to distinguish this Court's constitutional decisions prohibiting recovery for words that are the expression of an idea or obvious hyperbole. The court remanded the case for trial with directions to impose liability for the quoted words upon proof of *either* "negligent failure to exercise due care, or a greater degree of fault such as express or actual malice" (Appendix C, pp. 22, 24, 31).

The dissenting judge would have affirmed the trial court's entry of summary judgment, stating as follows:

"MANOS, J., DISSENTS.

> The article in question accurately stated that the plaintiff mistakenly leveled a building without authority to do so. Such an honest mistake does not reflect upon the plaintiff's business reputation. If, for example, the newspaper had reported that the plaintiff demolished the structure *knowing* that it had no authority, an action in libel would lie. However, the story in question alleged no such intentional misconduct, but only simple negligence. That the plaintiff made one honest mistake should not adversely affect his general business reputation.
>
> Moreover, the article is essentially correct.
>
> > '[I]t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or, as it is often put, to justify the "gist", the "sting", or the "substantial truth" of the defamation.' Prosser, *Law of Torts* 789 (4th Ed. 1971).
>
> If the story does contain a 'sting,' it is not the quote attributed to Mr. Maloney, but rather that the plaintiff demolished a building without the owner's permission. The story was therefore substantially true.

I conclude that: (1) The article did not adversely reflect upon the plaintiff's business reputation; (2) Assuming *arguendo* that the plaintiff's reputation was injured, this injury resulted from that portion of the article which was admittedly true. I must therefore respectfully dissent." (Appendix C, p. 32).

The Supreme Court of Ohio dismissed petitioners' constitutional appeal of right, stating that no substantial constitutional question exists herein (Appendix A), and overruled the motion to certify the record (Appendix B). This leaves in full force the Court of Appeals' reversal and remand for trial with directions that the six-word quotation is defamatory per se, and to submit the case on a liability issue of simple negligence.

## REASONS FOR GRANTING THE WRIT

In rejecting petitioners' First Amendment claims the Supreme Court of Ohio has decided important questions of press freedom contrary to applicable decisions of this Court. If the remand for trial is permitted to stand, the ability and willingness of the press to report the news generally, and judicial proceedings in particular, will be gravely impaired.

This Court's constitutional decisions in the libel field —beginning with *New York Times* and extending through *Gertz*[2]—make clear that the First Amendment precludes

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2. For brevity and ease of reading, we shall in this petition refer to past First Amendment decisions of this Court by their shorthand names, i.e., *New York Times*, *Butts*, *Gertz*, etc. Decisions so referred to include *New York Times v. Sullivan*, 376 U.S. 254; *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130; *Greenbelt Cooperative Pub. Ass'n. v. Bresler*, 398 U.S. 6; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323.

imposing liability (1) for less than "actual malice" in the reporting of certain matters, and (2) for statements of idea or hyperbole.

1. Unless reversed, the holdings of the Ohio Supreme Court and Court of Appeals will make it impossible for the press to report judicial decisions, particularly in a current and meaningful way. This Court has emphasized that "maximum freedom must be allowed the press" in "informing the citizens of . . . court proceedings." *Estes v. Texas*, 381 U.S. 532, at 539 and 541-42. The following cases likewise stress the public's right to be informed about judicial decisions and proceedings and the freedom of the press to report them: *Craig v. Harney*, 331 U.S. 367, 374; *In re Oliver*, 333 U.S. 257, 268. That freedom is nullified by the appellate court holdings below.

Such a constrictive result cannot be squared with the First Amendment and the cited decisions of this Court emphasizing the public's right to be informed of judicial proceedings as well as other public affairs. Published reports of judicial proceedings, like discussions of public officials and public figures, cannot give rise to liability for defamation unless the defamatory statements are made with "actual malice" in the *New York Times* sense. The First Amendment values which protect discussion of public officials apply with equal force to the reporting of judicial proceedings. The opinion in *New York Times* itself strongly suggests that reports of judicial proceedings should enjoy the protection of the "actual malice" standard, at least insofar as the reports concern the conduct of judges. 376 U.S., at 272-73. And Dean Prosser has concluded that the *New York Times* rule applies to the privilege for reporting judicial proceedings, noting that "it seems beyond dispute that even if the report is an inaccurate one, it is privileged unless it is made with knowl-

edge of the falsity or in reckless disregard of its truth." *Prosser on Torts*, 832 (4th ed. 1971).

Since it is abundantly clear (from the evidentiary material submitted in support of the motion for summary judgment and found sufficient for that purpose by the trial court) that petitioners' news report of this judicial proceeding was not published with "actual malice", petitioners cannot constitutionally be tried or held liable on some lesser ground.

2. Additionally, the result below cannot be squared with this Court's decisions in *Butts* and other cases that public figures must prove "actual malice" to recover for defamation.

Under all relevant tests, respondent was a "public figure" for purposes of this news item. A lawsuit, by its very nature, is a public controversy. This news item reported current events in the lawsuit to which respondent was a party, and all references to respondent were in connection with the lawsuit.

The relevant factors as specified in *Gertz* are present here. Respondent, as a party defendant, was clearly "drawn into a particular public controversy", and as a litigant participated directly and substantially "in the particular public controversy giving rise to the defamation." *Gertz*, 418 U.S., at 351-52.

The Ohio Court of Appeals wholly ignored this basic and decisive point in its opinion[3] (Appendix C), and the

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3. Although the appeal was briefed and submitted prior to the decision in *Gertz*, the Court of Appeals decided the appeal after *Gertz*—but without giving petitioners any opportunity to re-brief or re-argue in the light of *Gertz*.

Supreme Court of Ohio obviously did likewise in dismissing the appeal for the stated reason that no constitutional question exists herein.

3. Finally, the appellate courts below clearly departed from the rule running through all constitutional First Amendment cases commencing with *New York Times* that liability cannot be predicated on the erroneous interpretation of reports or records, or on the statement of an idea as distinguished from a fact, or on a statement obviously not intended to be taken literally. *New York Times*, 376 U.S., at 271-73; *Greenbelt*, 398 U.S., at 14; *Time, Inc. v. Pape*, 401 U.S., at 279, 285-86, 290, 291; *Gertz*, 418 U.S., at 339-41. Cf. *Letter Carriers v. Austin*, 418 U.S. 264, 284-86.

Of the several inaccuracies in the news article listed in the Court of Appeals opinion (Appendix C, p. 18), the only one deemed actionable (the others being clearly innocuous) is the quotation "I guess we got carried away.", ascribed to Thomas Maloney. It was not in fact said by him, nor is it clear who actually said it. However, the words, regardless of their source, are obvious hyperbole and not a statement of fact. They are rhetorical hyperbole even more clearly than the "blackmail" quotation in *Greenbelt* or the "scab" description in *Letter Carriers*.

These words are not actionable under the relevant constitutional decisions by this Court. *Greenbelt*, 398 U.S., at 14; *Gertz*, 418 U.S., at 339-40. Cf. *Letter Carriers v. Austin*, 418 U.S., at 284-86.

## CONCLUSION

If the constitutional guarantee of a free press is to mean anything as against State courts which ignore or pay lip service to decisions of this Court but do not follow them fully, and if the prompt and full reporting of the proceedings of the judicial branch of government is not to be stifled by the imposition of a simple negligence test of liability[4], this case must be reviewed. (This petition presents the same issues in these respects as pending Case No. 74-944, *Time, Inc. v. Firestone,* wherein the petition for writ of certiorari was granted on April 14, 1975.)

Additionally, this case must be reviewed if statements of idea and hyperbole are not to be penalized.

For the reasons stated, this petition should be granted.

Respectfully submitted,

RUSSELL E. LEASURE
1956 Union Commerce Building
Cleveland, Ohio 44115
*Attorney for Petitioners*

BAKER, HOSTETLER & PATTERSON
1956 Union Commerce Building
Cleveland, Ohio 44115
*Of Counsel*

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4. *Gertz,* 418 U.S., at 340-41; *Time, Inc. v. Pape,* 401 U.S. 279, 290-91; *St. Amant v. Thompson,* 390 U.S. 727, 731-32; *Time, Inc. v. Hill,* 385 U.S. 374, 389; *New York Times,* 376 U.S., at 279, 285; *NAACP v. Button,* 371 U.S. 415, 433; *Bon Air Hotel Inc. v. Time, Inc.,* 426 F.2d 858, 864-65 (CA5 1970).

## APPENDIX A

**Order of Supreme Court of Ohio Dismissing Appeal**

(Entered April 11, 1975)

No. 74-1088

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

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THOMAS H. MALONEY & SONS, INC.,
*Appellee,*

vs.

THE E. W. SCRIPPS CO. *et al.*,
*Appellants.*

---

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

## APPENDIX B

**Order of Supreme Court of Ohio Overruling Motion to Certify Record**

(Entered April 11, 1975)

No. 74-1088

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

---

THOMAS H. MALONEY & SONS, INC.,
*Appellee,*

vs.

THE E. W. SCRIPPS CO. *et al.*,
*Appellants.*

---

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

## APPENDIX C

**Opinion and Journal Entry of the Court of Appeals**

(Dated October 24, 1974)

No. 33179

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

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THOMAS H. MALONEY & SONS, INC.,
*Appellant,*

vs.

THE E. W. SCRIPPS COMPANY, *et al.*,
*Appellees.*

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JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Judgment reversed. See Opinion, and Krenzler, P.J.'s Concurring Opinion incorporated by reference and made a part of this journal entry. See Manos, J., Dissenting Opinion incorporated by reference and made a part of this journal entry.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for further proceedings consistent with this decision.

It is therefore considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ AL I. KRENZLER
*Presiding Judge*

KRENZLER, *P.J.*, JACKSON, *J.*, Concur. (See Concurring Opinion attached.)

MANOS, *J.*, Dissents. (See Dissenting Opinion Attached.)

## OPINION

### SYLLABUS

1. Consistent with *Gertz v. Robert Welch, Inc.* (1974), ..... U.S. ....., 41 L.Ed.2d 789, a private individual bringing a libel suit based upon a publication which is defamatory on its face may no longer rely upon the presumption of general damages or the presumption of malice heretofore permitted under the doctrine of libel *per se*. To recover in such a libel suit against a publisher, a private individual must prove actual injury, and some degree of fault on the part of the publisher, whether negligence or express or actual malice.

2. General damages may be presumed in a libel suit only upon a showing by the plaintiff that the defendant publisher was guilty of actual malice. *Gertz v. Robert Welch, Inc., supra.*

3. Punitive damages may be recovered in a libel suit only upon a showing that the defendant publisher was guilty of actual malice. *Gertz v. Robert Welch, Inc., supra.*

JACKSON, *J.*

This is an appeal from an order of the Common Pleas Court sustaining defendant's motion for summary judgment.

In 1969 plaintiff, Thomas H. Maloney & Sons, Inc., was hired to demolish a building. Through some mistake the plaintiff demolished not only the designated building but also a contiguous structure. The owner of this second building filed an action against Thomas H. Maloney & Sons, Inc. In March, 1970, the court granted partial summary judgment for the owner of the building on the issue of liability only. No determination of the amount of damages was made at this time.

On Friday, March 13, 1970, defendant published the following account of this judicial proceeding in the final edition of its newspaper, The Cleveland Press:

"Friday, The 13th Wasn't Their Day

"Wrong Building Wrecked—$15,000

> "Common Pleas Judge August Pryatel ruled today that the Thomas H. Maloney & Sons Wrecking Co., 16891 Brookpark Rd., must pay United Garage and Service Corp. $15,948.72 for a building wreckers demolished last Mar. 25.
>
> "They demolished the building, a repair station for taxicabs, by mistake.
>
> "The station, at 17202 Lorain Ave., was next to a building the wreckers were hired to demolish. Having demolished the right building, Maloney & Sons then tore down the wrong one.

> " 'Well, somebody, I don't remember who, said we should knock both buildings down,' Thomas Maloney told the Judge. 'I guess we got carried away.' "

The newspaper article was inaccurate in the following respects:

(1) The article stated that $15,948 damages were awarded when, in fact, there was no decision on damages.

(2) The name of the plaintiff was reported as Thomas H. Maloney & Sons *Wrecking Co.*, but plaintiff's name is simply, Thomas H. Maloney & Sons, Inc.

(3) The article stated that the building demolished was a repair station for taxicabs when, in fact, it was a service station.

(4) The story quoted Thomas Maloney as telling the judge, "I guess we got carried away," when, in fact, Thomas Maloney had been retired for several years, and the business is run by his son, Timothy Maloney. The evidentiary material before the trial court failed to establish that either Thomas Maloney, Timothy Maloney or anyone else had made such a statement.

Plaintiff filed this suit alleging that the contents of the newspaper article were false and defamatory in that it held the plaintiff company up to public ridicule and injured the company in its business.

Summary judgment was granted for the defendant, whereupon plaintiff appealed and assigned one error:

> "The trial court erred in granting a Motion for Summary judgment filed on behalf of the Defendant-Appellee."

For the reasons discussed below, we find this assignment of error is well taken.

## I.

In a recent decision, *Gertz v. Robert Welch, Inc.*, ..... U.S. ....., 42 U.S.L.W. 5123 (June 25, 1974), the Supreme Court of the United States readjusted the delicate balance between the law of defamation and the freedoms of speech and press protected by the First Amendment. The various pronouncements of the *Gertz* case necessitate that Ohio's present libel law be examined and reshaped to comply with the latest mandates of the United States Supreme Court.

In Ohio, libel is defined as a false and malicious publication made with the intent to injure a person's reputation or expose him to public hatred, contempt, ridicule, shame or disgrace, or to affect him adversely in his trade or profession. *Becker v. Toulmin* (1956), 165 Ohio St. 549; *Cleveland Leader Printing Co. v. Nethersole* (1911), 84 Ohio St. 118.

Ohio has heretofore recognized two types of libel, libel *per se*, and libel *per quod*. There are several distinct differences between the two types. *See, e.g. Becker v. Toulmin, supra. First,* libel *per se* is libel by the very meaning of the words used; whereas, libel *per quod* depends upon interpretation, inducement or innuendo. Libel *per se* is thus a matter of law, to be determined by the court, whereas libel *per quod* may be determined by a jury. *Second,* in libel *per se,* general damages are conclusively presumed as a matter of law, and proof of special damages is, therefore, not a prerequisite to judgment. In an action for libel *per quod* general damages are not presumed and the plaintiff has the burden to plead and prove special damages. *Third,* if published words are libelous *per se,* malice of the character necessary to support a judgment is

presumed;[1] whereas to make out a prima facie case of libel *per quod,* the plaintiff must allege and prove express malice.

Pursuant to present interpretations of Ohio law, a newspaper publication which of itself, reflects upon the character of a person by bringing him into public ridicule, or which affects him injuriously in his trade or profession is libelous *per se. Westropp v. E. W. Scripps Co.* (1947), 148 Ohio St. 365; *The Cleveland Leader Printing Co. v. Nethersole* (1911), 84 Ohio St. 118.

Therefore, the publication of a false statement ascribing to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful business, trade or profession is libelous. *Landrum v. Dombey* (1971), 30 Ohio App. 2d 200, 202.

The inaccurate portion of the news article which plaintiff claims to be libelous is the alleged quotation from Thomas Maloney, "I guess we got carried away." This alleged quotation subjects the plaintiff to public ridicule and ascribes characteristics to plaintiff's workers which are incompatible with the demolition trade, *i.e.,* a penchant for destruction which prevents them from stopping when the assigned demolition job has been completed. Were it not therefore, for the recently released *Gertz* decision by the United States Supreme Court, we would hold that the false quotation is libelous *per se.*

However, in *Gertz,* the Supreme Court has apparently ". . . federalized major aspects of libel law by declaring

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1. Such malice has been termed "express malice" and consists of an express design to injure, based upon ill will, hatred, revenge or reckless disregard of the rights of another. 34 OHIO JUR. 2d *Libel and Slander,* Sec. 58 *Express and Implied Malice* (1958). Express malice is to be distinguished from actual malice, defined by the U. S. Supreme Court to mean knowledge of falsity or reckless disregard of the truth.

unconstitutional in important respects the prevailing defamation law in all or most of the 50 states."[2]

Revelation of the full impact of the *Gertz* decision on Ohio libel law necessarily awaits possible future court interpretations and legislative enactments.[3] One clear result of the *Gertz* decision is that a plaintiff may no longer rely upon the doctrine of libel *per se*, as it was heretofore recognized in Ohio, to form the basis of a libel suit. This result is mandated by the holding of the *Gertz* case enunciated in the following two quotes:

(1) "[W]e hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz, supra,* at 810.

(2) "We hold that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standards of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Gertz, supra,* at 5130.

Prior to the two pronouncements quoted above, a private individual could make out a prima facie case of libel *per se* by showing that the defendant published a false statement concerning the plaintiff, and that the false statement was defamatory on its face. General damages were presumed, as was the malice of the publisher. The publisher's belief in the truth of the false publication, even if

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2. *Gertz v. Robert Welch, Inc.*, (1974) ..... U.S. ....., 41 L.Ed.2d 789 (Dissenting Opinion of Justice White).

3. See the dissenting opinion of Justice White for a thorough discussion of the impact of the *Gertz* case upon state defamation laws.

based on probable cause was not a defense, although such belief could be considered to mitigate damages. *Wilson v. Apple* (1827), 3 Ohio 270. The degree of care exercised by the publisher to ascertain the truth of the defamatory statement was irrelevant.

Therefore, libel *per se* is a doctrine which permits a finding of liability without proof of fault in the sense that malice is presumed and belief in the truth of the published statement, even if based upon reasonable diligence to ascertain such truth, is not a defense.

The *Gertz* decision specifically prohibits the imposition of liability without fault in defamation cases.[4]

We, therefore, hold that a private individual bringing a libel suit based upon a publication which is defamatory on its face must prove not only the publication of such statement but also actual injury,[5] and fault on the part of the publisher. Such fault may consist of either negligent failure to exercise due care, or a greater degree of fault such as express or actual malice.[6]

II.

Having reviewed the general legal principles announced in the *Gertz* decision, and some of their implications and affects [sic] upon the law of libel in Ohio, we

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4. The majority opinion written by Mr. Justice Powell merely forbids the imposition of "liability without fault," leaving definition of that term to the state courts. The concurring opinion of Mr. Justice Blackmun, however states, ". . . The court now conditions a libel action by private persons upon a showing of negligence, . . ." *Gertz, supra,* at 813.

5. Actual injury is not limited to out of pocket expenses, but may include customary types of actual harm inflicted by defamatory falsehood suc has impairment of reputation, personal humiliation, mental anguish and suffering. *Gertz, supra,* at 811.

6. See Note 1, *supra,* for a discussion of the difference between express malice and actual malice.

turn now to application of these principles to the facts and evidence of the case at bar.

Initially, we must reject the defendant-appellee's contention that the substance of the published article is true, and that any untrue words contained therein are not defamatory. The gist or the sting of the article was the admittedly false quote attributed to Thomas Maloney that "I guess we got carried away," which followed his alleged statement to the judge that "Well, somebody, I don't remember who, said we should knock both buildings down." This statement is defamatory because of the adverse affect it would tend to have on the plaintiff in his trade or profession. *See, Goudy v. Dayton Newspapers, Inc.* (1967), 14 Ohio App.2d 207.

Defendant's contention that the publication is protected by the so called "Times Rule" is also rejected. In *New York Times v. Sullivan* (1964), 376 U.S. 254, the Supreme Court announced what has become known as the "Times Rule," which is stated at p. 279 of the opinion as follows:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

This requirement of a finding of "actual malice" was later extended to suits by public figures in *Associated Press v. Walker* (1967), 388 U.S. 130, and further extended to suits by private individuals involving matters of public or general interest in *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29.

The Rosenbloom extension of the "Times Rule" to private persons has been eradicated by the *Gertz* decision. Litigation involving private individuals who seek damages for publication of a defamatory falsehood are now governed by the principles announced in *Gertz*, and discussed above.

Summary judgment may be granted only when the evidence properly considered discloses no genuine issue as to a material fact, and the movant is entitled to judgment as a matter of law. The record before us contains evidence which, when properly considered under Civil Rule 56(C), reveals that issues of fact made material by the *Gertz* decision are genuinely disputed by the parties. The decision of the lower court granting summary judgment for the defendant is consequently erroneous, and must be reversed.

Finding that the false quotation is defamatory on its face, we remand to the trial court for a determination of the material issues of fact, to-wit: (1) Was the article published with actual malice? If this finding is made, general damages may be presumed, and the plaintiff may be entitled to punitive damages;[7] (2) If the article is found to have not been published with actual malice, was the defendant guilty of some other degree of fault, whether negligence or express malice; (3) If it is found that the defendant was guilty of negligence or express malice, but not actual malice, the plaintiff is entitled to prove his actual damages.

Accordingly, the judgment of the trial court is reversed and remanded for further proceedings consistent with this decision.

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7. Plaintiff alleges that the article was printed with knowledge that it was false. Defendant denies this claim.

KRENZLER, *P.J.*, Concurs (See Concurring Opinion attached and incorporated herein);

MANOS, *J.*, Dissents (See Dissenting Opinion attached and incorporated herein).

KRENZLER, *J.* Concurs.

I concur in the judgment of reversal with the following additional comments.

In this case we are dealing with libel, one of the oldest common law actions. Libel is defined as a false and malicious publication, either in print or writing or by pictures, published with the intent to injure a person's reputation, or to expose such a person to public hatred, contempt, ridicule, shame, or disgrace, or to effect him injuriously in his trade, business, or profession. See *Becker v. Toulmin* (1956), 165 Ohio St. 549, *Cleveland Leader Printing Co. v. Nethersole* (1911), 84 Ohio St. 118, *State v. Smily* (1881), 37 Ohio St. 30.

Libel exists in two forms. Libel *per se* is libel by the very meaning of the words used. It is libel as a matter of law. In a case of libel *per se*, a cause of action is stated, and recovery of general damages may be had without pleading or proving such damage because general damages will be conclusively presumed. However, in order to recover special damages, they must be pleaded and proved.

Libel *per quod* is libel by interpretation, through inducement or innuendo, between an innocent or harmless meaning and a defamatory one. The publication, on its face not libelous, becomes so by the use of an innuendo rendering the apparently harmless words into libelous ones by extrinsic evidence. In such a case the plaintiff may not recover damages without pleading and proving special damages.

Many years after the law of libel was firmly established the U.S. Constitution was adopted with its First Amendment right to free speech. For a long period of time there was no discernible conflict between the two. Libel was part of that well defined and narrowly limited class of speech, the prevention and punishment of which was never thought to raise any constitutional problem. *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 86 L. Ed. 1031.

In 1964 the United States Supreme Court decided *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, which dealt with the alleged libel of a public official. *Sullivan* established the predominance of the First Amendment over the right of a public official to recover in a libel action. In *Sullivan* the Supreme Court stated that there is a national commitment to the principal [sic] that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasant attacks on government and public officials. Further, erroneous statements are inevitable in free debate and must be protected if the freedoms of expression are to have the breathing space that they need to survive. The Supreme Court said that a rule compelling the critic of official conduct to guarantee the truth of his factual assertions, and to do so on pain of libel judgments virtually unlimited in amount leads to intolerable "self censorship," and would be a limitation on the right of free speech. The constitutional guarantees require that a public official be prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was true or not.

Three years after *Sullivan* a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." *Curtis Publishing Co. v. Butts* and its companion *Associated Press v. Walker* (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, reh den 389 U.S. 889, 19 L. Ed. 2d 197, 198.

The next case of importance was *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, 29 L. Ed. 2d 296. In this case there was not a clear majority but there was a plurality which in effect held that the New York Times standard would apply to private individuals where the allegedly libelous conduct involved a public issue.

The most recent case involving libel is *Gertz v. Robert Welch, Inc.* (1974), ..... U.S. ....., 41 L. Ed. 2d 789, decided on June 25, 1974, in which the Supreme Court was faced with a libel action involving a private citizen and a non-public issue.

In affirming its position taken in *Sullivan* the Court commented that the First Amendment requires that we protect some falsehood in order to protect speech that matters, but in *Gertz* they also recognized the legitimate state interest underlying the law of libel which is the compensation of individuals for the harm inflicted upon them by defamatory falsehood. The Court acknowledged that some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. *Gertz* was an attempt to make some accommodation between the needs of a free press and the states' interest in protecting private individuals, as contrasted with public persons, from the harm of defamatory falsehoods.

The Supreme Court took the position that private individuals are more vulnerable to injury than public per-

sons, and that therefore the states' interest in protecting them is correspondingly greater. The Court concluded that a public person's access to the media enables him to better defend himself against this type of attack. Further, the Court stated that public persons have voluntarily exposed themselves to the increased risk of injury from defamatory falsehoods by virtue of their chosen position in society. For these reasons the Supreme Court established a constitutional distinction between public and private defamation plaintiffs.

In *Gertz* the Court fashioned the new rules to govern libel actions concerning private individuals. It declined to apply the New York Times standard and eliminated libel *per se* and presumed damages by holding that liability without fault in a libel action was no longer constitutionally permissible.

The Supreme Court said that the states' interest in compensating injury to the reputation of private individuals is greater than for public officials and public figures. So long as a state does not impose liability without fault, it may define for itself the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and which in substance makes substantial danger to reputation apparent. A private defamation plaintiff who establishes liability may recover compensation for actual injury but may not recover for punitive damage when such recovery is not based on knowledge of falsity or reckless disregard for the truth. The Supreme Court did not define actual injury but stated that trial courts have wide experience in framing appropriate jury instructions in tort actions. The court further said that actual injury is not limited to out-of-pocket loss and the more customary types of actual harm inflicted by defamatory falsehood includes impairment of reputation

and standing in the community, personal humiliation and mental anguish and suffering. Jury awards must be supported by competent evidence concerning the injury and the jury's discretion over awards is limited only by the rule that they not be excessive.

In other words, the Supreme Court said that a negligence standard would now be applied in private defamation actions, and a private defamation plaintiff who establishes liability and damage by a preponderance of the evidence may recover such damages as are sufficient to compensate him for actual injury. A plaintiff may recover punitive damages if he can prove that the article was published with knowledge of its falsity or a reckless disregard for the truth.[1]

In deciding *Gertz* the United States Supreme Court was faced with three alternatives:

1. Treat private citizen plaintiffs the same as public officials and apply the *New York Times* standard which requires the plaintiff to prove publication of defamatory falsehood "with actual malice—that is, in the knowledge that it was false or with reckless disregard for whether it was true or not", or;

2. Treat public officials differently than private citizens by applying the *New York Times* standard to public officials and by permitting to stand the old common law rule of libel *per se* as applied to private citizens, or;

3. Treat public officials and private citizens differently by applying the *New York Times* standard to public officials and eliminate and declare libel *per se*

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1. The *New York Times* standard.

and presumed damages unconstitutional and adopt a new rule for private citizens requiring them to allege and prove a libelous writing, negligent publication and actual damages.

While the Supreme Court did not apply the *New York Times* standard to private individuals it declared libel *per se* unconstitutional because it permitted liability without fault and the Court then fashioned the aforementioned new rule for private libel plaintiffs.

Writing for the Court, Mr. Justice Powell stated that the Constitution does not require the drawing of a thin line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. With this in mind they sought a middle ground by not placing the heavy burden of the *New York Times* standard upon the back of the private defamation plaintiff, but they did strip him of his most useful legal tool—libel *per se*. Where before *Gertz* he need not have proved anything beyond the existence of a statement libelous on its face in order to recover, he now must bear the same burden borne by all other plaintiffs in a negligence action.

The United States Supreme Court in *Gertz* cautioned that States may enact libel legislation as long as such legislation does not impose liability without fault. Insomuch as *Gertz* was decided by the United States Supreme Court and Ohio does not as yet have legislation implementing *Gertz*,[2] trial courts in Ohio must try libel actions brought by private individuals by the standards pronounced in *Gertz*. This means that a plaintiff must allege

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2. Chap., 2739 of the Revised Code deals with libel and slander, but its provisions are not applicable to the holding in *Gertz*.

and prove by a preponderance of the evidence a false and libelous writing, negligence by the defendant, and damages. If a plaintiff wishes to recover special damages he must allege and prove them. If a plaintiff in a libel action wants to recover punitive damages he must allege and prove that the defendant had knowledge of the falsity or that he showed a reckless disregard for the truth.

In the present case, the plaintiff alleged that he was libeled and defendant denied liability. Depositions were taken; affidavits submitted. The defendant filed a motion for summary judgment contending that there was no material issue of fact and that it was entitled to judgment as a matter of law. The trial court granted the summary judgment.

We have reviewed all of the material submitted to the Court, and in view of the recent rulings by the United States Supreme Court in *Gertz,* a summary judgment was not appropriate. *Gertz* requires that the plaintiff in this case should have his day in court; being a private citizen he should have the opportunity to prove by a preponderance of the evidence that there was a libelous article written about him and published, that the article was false and that the defendant was negligent in the printing of the article, and that the plaintiff was damaged. He must show actual injury. If he seeks special damages he must allege and prove them. If he seeks punitive damages he must show that the defendant acted with knowledge of falsity or with reckless disregard for the truth.

Under the *Gertz* standard the trial court erred in granting the defendant summary judgment because there are material issues of fact and the defendant was not entitled to judgment as a matter of law.

I concur in the judgment of reversal.

MANOS, J., Dissents.

The article in question accurately stated that the plaintiff mistakenly leveled a building without authority to do so. Such an honest mistake does not reflect upon the plaintiff's business reputation. If, for example, the newspaper had reported that the plaintiff demolished the structure *knowing* that it had no authority, an action in libel would lie. However, the story in question alleged no such intentional misconduct, but only simple negligence. That the plaintiff made one honest mistake should not adversely affect his general business reputation.

Moreover, the article is essentially correct.

> "[I]t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or, as it is often put, to justify the 'gist', the 'sting', or the 'substantial truth' of the defamation." Prosser, *Law of Torts* 789 (4th Ed. 1971).

If the story does contain a "sting," it is not the quote attributed to Mr. Maloney, but rather that the plaintiff demolished a building without the owner's permission. The story was therefore substantially true.

I conclude that: (1) The article did not adversely reflect upon the plaintiff's business reputation; (2) Assuming *arguendo* that the plaintiff's reputation was injured, this injury resulted from that portion of the article which was admittedly true. I must therefore respectfully dissent.

## APPENDIX D

**Judgment Entry of the Court of Common Pleas**

(Dated October 4, 1973)

No. 892881

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

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THOMAS H. MALONEY AND SONS, INC.,

vs.

E. W. SCRIPPS COMPANY *et al.*

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Judgment in favor of the defendants; costs assessed against plaintiff.